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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

June 2, 1994

VIA HAND DELIVERY

Byron F. Marchant, Legal Advisor
Office of The Honorable Andrew C. Barrett
Federal Communications Commission
Room 826
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation
(an original and one copy filed with the Secretary)
General Docket No. 90-314

Dear Byron:

This letter will memorialize and amplify my comments in our meeting concerning the need for a 20 MHz frequency block to be set aside for small business in the Commission's reconsideration of the Second Report and Order, 8 FCC Rcd 7700 (1993).

It is my understanding that the Commission is currently contemplating a new frequency allocation plan -- the so-called "Motorola Plan" -- which would result in the creation of two (2) 30 MHz MTA blocks, one (1) 30 MHz BTA block, and three (3) 10 MHz BTA blocks. Under that plan, no frequency blocks would be set aside for the Designated Entities (small business, rural telcos, and businesses owned by minorities and women). Consideration would instead be given to providing the Designated Entities with bidding credits and other means to facilitate their participation in the provision of PCS service.

I can appreciate the formidable task the Commission faces in trying to develop a frequency allocation plan that accommodates the Congressional mandate in Section 309(j) in a feasible and fair manner. That goal, however, will not be achieved through the Motorola Plan. That plan's failure to set aside any frequency block for any of the Designated Entities will, as practical matter, severely limit, and in some cases entirely preclude, their participation -- even assuming that the Commission provides bidding credits and other mechanisms to

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facilitate participation by Designated Entities. Meaningful participation by Designated Entities will probably be achieved only if a 20 MHz BTA is set aside for bidding exclusively by Designated Entities.

The merits of the latter proposal require consideration of three (3) basic issues: (1) whether the Motorola Plan will effectively preclude meaningful participation by small businesses and other Designated Entities; (2) whether a frequency block set aside exclusively for Designated Entities can be designed in a way to avoid constitutional challenge; and (3) whether a 20 MHz BTA block can be viable.

Defects of Motorola Plan

There is no reason to expect that any Designated Entity will be able to acquire either a 30 MHz MTA or 30 MHz BTA license in its own name. Nor is there any basis to believe that the availability of the three 10 MHz BTA licenses will provide sufficient opportunity for the Designated Entities.

Although no one know can predict the winning bid prices for a 30 MHz MTA license, it is fair to assume that the cost will exceed $100 million and in some cases may approach $150 million. The cost of constructing a 30 MHz MTA license will involve the expenditure of hundreds of millions of additional dollars over the course of the 10-year license term. No small business will be able to assume those obligations -- even assuming that the Commission is prepared to offer substantial bidding credits, installment payment plans, and other benefits to the small business.

A 30 MHz BTA license will probably be less expensive to acquire than a 30 MHz MTA license. Nonetheless, the cost is still likely to exceed $50 million and may approach $100 million or more. The bid is likely to be particularly high since there are many large companies who will be unable to acquire one of the two 30 MHz MTA licenses and will therefore view the 30 MHz BTA license as a last opportunity to become involved in what promises to be an explosive and highly remunerative industry. Those companies will include Fortune 500 firms who will have access to far greater resources than any small business. Even with a 25 percent or 35 percent bidding credit, a Designated Entity is unlikely to be able to match those resources.

The three 10 MHz BTA licenses will probably be of little value to small business. Assuming that the Commission adheres to its earlier decision to allow cellular carriers to aggregate up

to 40 MHz of spectrum, it is reasonable to expect that the two licensed cellular carriers in each market will apply their substantial resources to acquire two of the 10 MHz BTA licenses. That will leave one 10 MHz BTA license for all other parties. To the extent that spectrum is viewed as valuable as a stand-alone proposition -- which is doubtful -- the competition will be fierce. In that latter case, a substantial bidding credit and the opportunity to pay the winning bid through an installment plan will be of considerable benefit. However, even if the small business is able to use those benefits to acquire the license, it will be a questionable victory. There will be no assurance that that sliver of spectrum can be aggregated with any other spectrum to make it competitive with the three 30 MHz licensees (not to mention the two licensed cellular carriers and ESMR providers). It may be that the 10 MHz BTA licensee will be able to provide some special niche service -- but that hardly constitutes the kind of meaningful opportunity which Congress had in mind when it enacted Section 309(j).

The Constitutionality of a "Set Aside"

It is my understanding that questions have been raised concerning the constitutionality of any regulation or policy which would result in certain frequency blocks being set aside exclusively for bidding by Designated Entities. This concern in turn is premised on judicial decisions which require intermediate or strict scrutiny of classifications based on race, gender or other classifications suspect under the Fifth or Fourteenth Amendments. E.g. Metro Broadcasting, Inc. v. FCC, 110 S.Ct 2997, 3008-09 (1990); Harris v. McRae, 448 U.S. 297, 322-23 (1980). Intermediate or strict scrutiny requires an examination of the government interest to be served by the regulation and the extent to which the regulatory measure is designed to serve that interest.

Although there is reason to believe that a frequency "set aside" for Designated Entities would pass muster under either scrutiny, there is nevertheless some risk that a constitutional challenge in court could succeed and thereby disrupt the implementation of the Commission's chosen regulatory scheme and the deployment of PCS service. That same risk attaches as well to any bidding credits or other measures based upon race, gender, or other suspect classifications.

There is a simple and appropriate means to avoid those risks of constitutional challenge: set aside a 20 MHz BTA frequency block and apply bidding credits and other benefits only for small businesses. An economic classification of that kind would not

involve any constitutionally-suspect criteria. As a result, the legislative goal would be sustained if there are any conceivable reasons to justify the action. See FCC v. Beach Communications, Inc., 113 S.Ct 2096, 2101 (1993). That burden could be satisfied regardless of whether Congress had established any record or articulated any basis to support the classification. Id. Conversely, "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it. . .'" Id., 113 S.Ct at 2102.

For its part, the Commission would merely have to provide a reasonable basis to justify the regulation -- a burden that would also be easy to satisfy. In mandating that the Commission promote opportunities for "small businesses, rural telephone companies, and businesses owned by members of minority groups and women," 47 U.S.C. §309(j)(3)(B), Congress was plainly interested in providing opportunities for groups that had previously been economically disadvantaged in the acquisition of licenses for communications services. Congress did not want the Commission to provide incentives and additional benefits for major companies which happened to be controlled or owned by minorities or women. Therefore, confining the "set aside" frequencies and other benefits to small business will serve the Congress' mandate in Section 309(j). To the extent businesses owned by minorities and women are disadvantaged, they should be able to satisfy whatever eligibility criteria the Commission adopts for small businesses. Nor would there be any risk of constitutional challenge: the courts have repeatedly upheld legislation based upon economic classifications. E.g. Fortec Constructors v Kleppe, 350 F.Supp. 171, 173 (D.D.C. 1972) (upholding SBA program for socially or economically disadvantaged companies).

Confining frequency "set asides" to small business would also be fair. It would be inequitable to require small business to compete against Fortune 500 corporations and other well-endowed companies merely because they happen to be owned by minorities or women. This latter point also underscores why bidding credits, installment payment plans, and other benefits should similarly be confined to small business: those benefits, in effect, enhance a bidding party's ability to offer more for payment of the license at the auction.

In short, by setting aside a frequency for exclusive bidding by small business -- coupled with bidding credits, installment payment plans and whatever other benefits are deemed appropriate -- the Commission will help ensure the dissemination of PCS licenses among small businesses as well as those owned by minorities and women.

Viability of 20 MHz BTA

The current preference for the Motorola Plan appears to be premised in large part on a broadly-held view that a licensee of a 20 MHz BTA cannot be competitive with a 30 MHz licensee, licensed cellular carriers, or ESMR providers. These concerns were highlighted by Commissioner Barrett's thoughtful dissent to the Second Report and Order, 8 FCC Rcd at 7853. This view was also shared by many of the participants in the panel discussions sponsored by the Commission last April.

Since PCS is not yet an operating service, Commissioner Barrett's analysis, as well as the comments of others opposing use of 20 MHz BTA blocks, necessarily placed great reliance on assumptions rather than prior experience. There is ample reason to believe, however, that a 20 MHz BTA frequency block will be viable with cellular carriers, 30 MHz PCS licensees, and ESMR providers.

From an operational perspective, there are two basic differences between a 20 MHz BTA frequency block and a 30 MHz MTA frequency block: the 20 MHz BTA block has less capacity and covers less area. Neither of those differences will preclude the 20 MHz BTA licensee from fully competing in the wireless mobile communications market.

Although it will have 10 MHz less spectrum, the 20 MHz BTA licensee will still have a substantial amount of capacity to accommodate thousands of subscribers. It should be remembered that the original allocation for licensed cellular carriers in MSA markets -- which are in most respects similar in size to a BTA -- was 20 MHz. Cellular Communications Systems, 86 FCC2d 469, 474-78 (1981) (subsequent history omitted). As in the case of cellular, the smaller size of the BTA should not handicap the 20 MHz BTA licensee in competing with the 30 MHz licensee. The BTA licensee can enter into the same kind of roaming agreements which currently enable cellular to provide nationwide service. Since the BTA is smaller than an MTA, the BTA licensee will probably have to enter into more roaming agreements than the 30 MHz MTA licensee, but there is no reason to believe that that greater number of roaming agreements will handicap the 20 MHz BTA licensee.

Advances in technology will further diminish any operational difference between a 30 MHz MTA license and a 20 MHz BTA license. Through CDMA and TDMA, licensees will be able to greatly expand the communications capacity of their respective systems. Thus, a

20 MHz BTA licensee for PCS today will be able to handle far more communications than the 20 MHz cellular licensee fourteen (14) years ago.

Another factor concerns replacement of existing microwave users. There appears to be a widespread assumption that the 20 MHz BTA licensee will be hampered by the need to displace existing microwave users. Unfortunately, broad generalizations cannot be a substitute for market-by-market analysis. On the one hand, a 30 MHz licensee may have more spectrum available to use while existing microwave users are being displaced; on the other hand, the 20 MHz licensee may not encounter widespread microwave use and, in any event, may not have difficulty in arranging for the displacement of existing microwave users. Indeed, there may be some situations where a 30 MHz BTA licensee may encounter the same relative amount of microwave usage (or even more) within its licensed area as a 20 MHz BTA licensee.

The final consideration is the need and cost for capital. A 20 MHz BTA license will require substantially less monies than a 30 MHz BTA to build and far less than a 30 MHz MTA license. That lower cost in turn will facilitate the ability of the 20 MHz BTA licensee to raise capital and establish a positive operating financial condition.

Conclusion

I hope the foregoing comments are useful. In any event, I very much appreciate your time.

Sincerely,

KECK, MAHIN & CATE

By: _____
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